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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1064

JACK B. KREMENS, *et al., Appellants*

v.

KEVIN BARTLEY, *et al., Appellees*

On Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF CHILD PSYCHIATRY, AND AMERICAN ASSOCIATION OF PSYCHIATRIC SERVICES FOR CHILDREN, AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

The American Psychiatric Association (A.P.A.), founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Over 21,000 of the nation's approximately 25,000 psychiatrists are members of the Association. The A.P.A. has participated as an amicus curiae numerous times in cases throughout the country involving mental health issues.

The American Society for Adolescent Psychiatry is a nationwide organization of approximately 1,200 doctors of medicine who specialize in the practice of adolescent psychiatry. The American Academy of Child Psychiatry is a nationwide organization of approximately 1,600 doctors of medicine who specialize in the practice of child psychiatry. The American Association of Psychiatric Services for Children is a national multi-disciplinary organization of child mental health agencies and professionals, whose membership includes 175 separate agencies with total staffs of approximately 10,000 people.

Amici believe this case to be of great significance to the quality of care available to mentally ill and mentally retarded children. The landmark ruling below that parents may not obtain even short-term residential psychiatric care for such children without judicial intervention is of immense concern to members of amici and to their patients.

CONSENT OF THE PARTIES

Amici are filing this Brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

This case is here on appeal from the decision of a three-judge United States District Court for the Eastern District of Pennsylvania granting broad declaratory and injunctive relief against the continued enforcement of Sections 402 and 403 of Pennsylvania's Mental Health and Mental Retardation Act of 1966.

The named plaintiffs in this class action are juveniles who were admitted to a Pennsylvania state hospital

by their parents pursuant to the above provisions of Pennsylvania law. App. 788a-89a. The named plaintiffs ranged in age from 14 to 17 at the time of their hospitalization and purport to represent all persons 18 years of age or younger who have been, are, or may be admitted to mental health facilities in Pennsylvania under Sections 402 and 403. App. 783a, 789a. Plaintiffs sought an order declaring these provisions of state law unconstitutional as violating plaintiffs' rights to procedural due process under the Fourteenth Amendment to the United States Constitution, and they sought injunctive relief against continued enforcement of these provisions by defendant state officials.

The statute at issue here and its implementing regulations allowed[1] parents to place their mentally ill or mentally retarded child in a mental health facility if the parents' conclusion that the child's best interests require residential care was confirmed by the written opinion of a referring psychiatrist (or a medical or psychological opinion in the case of a retarded child) *and* by an independent examination of the child to be conducted by the director of the proposed institution, or his delegate. Children 13 years of age or older received notice that they had a right to obtain appointed counsel and to object to remaining in the institution. Any objecting child would be released within two business days unless an involuntary commitment proceeding was initiated. App. 815a-16a.

The district court, one judge dissenting, held that Sections 402 and 403 violated plaintiffs' rights because these provisions allowed parents to admit their children to mental health institutions without granting the children certain enumerated elements of procedural

[1] A new state statute recently repealed many provisions of the law reviewed by the court below. *See* Section I, *infra*.

due process. The court ordered that henceforth all children admitted to Pennsylvania mental health institutions must have counsel appointed for them and receive written notice that a "probable cause hearing" will be held within 72 hours of hospitalization. In addition, a full "post-commitment hearing" must be held within two weeks of hospitalization. At both such hearings the court ordered that the child and counsel shall have the right to be present, cross-examine witnesses and present testimony in order to challenge before an impartial tribunal the propriety of the parents' and admitting psychiatrists' judgment that the child needs residential care. The court also ordered that within 120 days of the effective date of its Order each of the thousands of children hospitalized in state mental health facilities must be either discharged or recommitted under the court-imposed procedures. App. 843a-52a.

This Court on December 16, 1975, granted a stay of the district court's Order, and on March 22, 1976, noted probable jurisdiction over this appeal.

SUMMARY OF ARGUMENT

This case presents novel and difficult questions concerning the proper procedures for parents and guardians to follow when residential psychiatric care is medically recommended for their children. The issues are complex, because resolution of these procedural questions will have a profound impact on other competing rights and interests of both the children and their parents.

This Court has emphasized repeatedly that parents have a basic constitutional right and responsibility to control the upbringing of their children. *See, e.g., Wis-*

consin v. *Yoder,* 406 U.S. 205, 232 (1972); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925). This right is not without limitations, *see Planned Parenthood* v. *Danforth,* 44 U.S.L.W. 5197, 5203-04 (U.S., July 1, 1976); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944), but, absent extraordinary circumstances, it should be controlling in view of the fundamental legal and societal interest in preserving the integrity and autonomy of the family unit. The lower court not only failed to give any consideration to this principle of parental rights and duties, but it also ignored the fact that in certain categories of mental health admissions the legal imposition of adversary hearing procedures will prove therapeutically counter-productive for the child, because of the very delicate emotional problems present in such parent-child conflicts.

The decision below applies the deceptively simple syllogistic reasoning that children's interest in avoiding admission to residential psychiatric care is a protected interest within the meaning of the Fourteenth Amendment's Due Process Clause, and therefore that all the traditional elements of procedural due process must apply to all these cases. Such an approach should have been the beginning, not the end, of the analysis, however.

Once it is determined that due process applies, the courts must still undertake the separate and highly subtle determination of what process is due. *Goss* v. *Lopez,* 419 U.S. 565, 577 (1975); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). Due process is a flexible concept, and its elements must be decided in each situation with full regard for the competing interests and practical consequences of applying them. *Wolff* v. *McDonnell,* 418 U.S. 539, 563, 567 (1974).

The district court did not undertake such an analysis, but instead tried to fit these diverse cases into a rigid due process model to which they do not conform. The court ignored the fact that the class of plaintiffs varies dramatically with regard to the factors most relevant to the effect of the proposed procedures on the rights of children and their parents. The court ignored the very real harms that formal adversary hearing procedures can create in certain categories of cases.

Amici recognize that there are serious flaws in our nation's system of mental health care for children. These problems may be exacerbated, rather than alleviated, however, by the decision below. Amici believe that there are well-defined categories of cases in which *carefully crafted* hearing procedures may be appropriate and helpful. In other situations, which we describe in Section III, below, the potential harm of such procedures far outweighs any possible value, and thus both law and logic demand that they be excepted from any constitutionally imposed rule.

Amici contend that balancing the competing interests—in terms both of constitutional rights and of mental health concerns—should lead the courts to except from formal hearing requirements those cases in which 1) a parent in an intact family wishes to admit a 2) pre-adolescent child 3) to an accredited institution 4) for a short-term period (*e.g.*, less than 45 days). We will set forth below why we believe this to be the most appropriate resolution of these important and difficult issues.

ARGUMENT

I. ON JULY 9, 1976, PENNSYLVANIA ENACTED A NEW STATUTE GOVERNING THE ADMISSION OF MENTALLY ILL CHILDREN.

At the outset, Amici must bring to the Court's attention the very recent passage of a new Pennsylvania law

governing the procedures for admission of children to state mental health institutions. Signed into law by the Governor on July 9, 1976, the Mental Health Procedures Act, Pa. Act No. 143 ("Act"), completely repeals, "except in so far as they relate to mental retardation," the provisions of state law declared unconstitutional by the court below. *Id.*, § 502. Thus, while the state procedures reviewed by the lower court continue to apply to the admission of mentally *retarded* children to state institutions, the prior procedures for mentally *ill* children have been repealed and replaced by the provisions of the new Act.

Under this new state law, children who are 14 years of age or older have essentially the same rights concerning voluntary or involuntary admission to treatment as do adults. *Id.*, § 201.[2] Children less than 14 years of age may be admitted for treatment by a parent, although "any responsible party" may petition the court to withdraw the child from such treatment. *Id.*, §§ 201, 206(b). The new state statute makes many other changes in the state law under consideration here, including a requirement that each person admitted to state mental institutions has a statutory right to an individualized treatment plan that will afford the patient "adequate treatment for his condition," *id.*, §§ 104, 107, and that every patient "shall be examined by a treatment team and his treatment plan reviewed not less than once every 30 days." *Id.*, § 108. Such reexamination and review must ensure that each patient "shall not remain in treatment or under any particular

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[2] The only exception is that if a child over 14 admits himself or herself voluntarily, the child's parents may petition the court to have the treatment terminated and the child returned home. Act, § 204.

mode of treatment for longer than such treatment is necessary and appropriate to his needs." *Id.*, § 108(b). Amici recognize that this Court may conclude that it would be appropriate to vacate the decision below and remand this case for an initial interpretation of the extent to which this new state law departs from the prior statutory procedures reviewed by the court below. *See, e.g., Fusari* v. *Steinberg,* 419 U.S. 379 (1975).

Nevertheless, since counsel for Appellants and Appellees have informed Amici that they do not intend to suggest to the Court that it should remand this case for reconsideration in light of the new statute, and since the Court might conclude that certain aspects of the decision below raise recurring questions not rendered moot by passage of the new legislation, Amici will proceed in this Brief to set forth the considerations which we believe should govern if this Court reviews the merits of the decision below.

II. THE LOWER COURT FAILED TO TAKE INTO ACCOUNT THE ESSENTIAL RESPONSIBILITIES AND RIGHTS OF PARENTS FOR THE UPBRINGING OF THEIR CHILDREN, AND THE POSSIBLE HARMS INVOLVED IN REQUIRING DUE PROCESS ADVERSARY HEARINGS IN ALL CASES.

As professional organizations whose members are devoted to assuring the highest quality of mental health care, Amici share the concern of plaintiffs and the court below that children all too often are admitted to mental health institutions that are not appropriate for their needs, or are allowed to remain in institutions far longer than medically desirable. In seeking to cure this problem, however, the district court attempted to fit this case into a traditional due process mold to which it does not easily conform. The lower court has promulgated a rigid constitutional rule that not only ignores the very important responsibilities and rights

of parents to control the upbringing of their children, but also disregards the clinical realities which suggest that in some cases due process hearings in fact may prove harmful to the child's best interests.

The district court cited cases such as *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), and *Goss* v. *Lopez,* 419 U.S. 565 (1975), for the proposition that plaintiffs in this case have a liberty interest within the contemplation of the Fourteenth Amendment Due Process Clause. However, that should have been the beginning, not the end, of the analysis. "Once it is determined that due process applies, the question remains what process is due." *Goss* v. *Lopez,* 419 U.S. 565, 577 (1975); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972).

This Court has repeatedly emphasized that due process is a flexible concept which must vary according to the particular circumstances and competing interests involved in a specific situation. *Morrissey* v. *Brewer, supra,* 408 U.S. at 481. "[T]he interpretation and application of the Due Process Clause are intensely practical matters," *Goss* v. *Lopez, supra,* 419 U.S. at 578, and "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Wolff* v. *McDonnell,* 418 U.S. 539, 560 (1974); *Cafeteria & Rest. Workers Union* v. *McElroy,* 367 U.S. 886, 895 (1961). Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* "[N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer, supra,* 418 U.S. at 481.

In the instant case, Amici believe that the lower court failed to take into account two fundamental factors that must be considered in any analysis of what process

is due when parents seek to admit their child to a mental health institution: (1) the parents' independent constitutional right and responsibility to control the upbringing of their child; and (2) the severe harms that can be caused in certain situations by application of a traditional due process hearing procedure—which was designed for conflicts between the state and an individual—to the very different, and emotion-laden situations that arise when the essential conflict appears to be between parent and child. Amici contend that a review of those factors should lead this Court to conclude that due process hearing procedures are appropriate in certain categories of children's mental health admissions, but that the court below has failed to craft its remedy with due consideration to the important and sometimes competing interests at stake in different categories of cases covered by this litigation.

A. Parents Have a Basic Constitutional Right To Control the Upbringing of Their Children

This Court has repeatedly emphasized the long-recognized right of parents to control the upbringing of their children.

More than fifty years ago, in *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), the Court included within those liberties protected by the Fourteenth Amendment the basic right to "bring up children." The Court later cited the *Meyer* decision in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), declaring unconstitutional a state law that required parents of children between eight and sixteen years of age to send their children to public, rather than private, school. The Court held that it was "entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians

to direct the upbringing and education of children under their control." *Id.* at 534-35. Parents' authority to control the upbringing of their children is "basic in the structure of our society." *Ginsberg* v. *New York,* 390 U.S. 629, 639 (1968).

In *Wisconsin* v. *Yoder,* 406 U.S. 205, 232 (1972), the Court emphasized the "primary role of the parents in the upbringing of their children":

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

See also Prince v. *Massachusetts,* 321 U.S. 158, 166 (1944) (recognizing existence of "the private realm of family life which the state cannot enter"); *Stanley* v. *Illinois,* 405 U.S. 645, 651 (1972):

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May* v. *Anderson,* 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska, supra,* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma, supra,* at 541, and the Ninth

Amendment, *Griswold* v. *Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Finally, in *Runyon* v. *McCrary,* 44 U.S.L.W. 5034, 5039-40 (U.S., June 25, 1976), this Court reviewed the authorities discussed above and concluded that the parental rights recognized by cases such as *Meyer, Pierce,* and *Yoder,* and the familial privacy rights recognized in cases such as *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), "may be no more than verbal variations of a single constitutional right." *Runyon* v. *McCrary, supra,* 44 U.S.L.W. at 5040 n. 15.

These parental rights are not, of course, without limitations. *See Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). While parents generally have the right to give or withhold consent for most surgical procedures for their children, *see Bonner* v. *Moran,* 126 F.2d 121 (D.C. Cir. 1941); *Scaria* v. *St. Paul Fire & Marine Ins. Co.,* 68 Wisc. 2d 1, 227 N.W.2d 647 (1975), courts have overruled parents' religious objections and ordered blood transfusions that were necessary to save the child's life. *See, e.g., People* v. *Labrenz,* 411 Ill. 618, 104 N.E.2d 769 (1952); *Muhlenberg Hosp.* v. *Patterson,* 128 N.J. Super. 498, 320 A.2d 518 (1974).[3] However, such interference with parental discretion has been rare and is generally limited to instances where a child is in danger of suffering grievous harm. *See Muhlenberg Hosp.* v. *Patterson, supra,* 320 A.2d at

[3] *See generally* Annotation, *Power of Court Or Other Public Agency To Order Medical Treatment Over Parental Religious Objections for Child Whose Life Is Not Immediately Endangered,* 52 A.L.R.3d 1118 (1973); Annotation, *Power of Public Authorities To Order Medical Care for a Child Over Objection of Parent or Custodian,* 30 A.L.R.2d 1138 (1953).

521; Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383, 1398-99 (1974) (standard is one of "severity and irreversibility" of harm to child); Note, *Child Neglect: Due Process for the Parent,* 70 COL. L. REV. 465, 472 (1970) ("the state should not be permitted to take this drastic step [intervening in parental decisions] without demonstrating that the child has been inflicted or threatened with serious harm"). *Compare In re Green,* 448 Pa. 338, 292 A.2d 387, 392 (1972) (state interest in child's health outweighs parents' religious belief only when child's life immediately imperiled), *with In re Seiferth,* 309 N.Y.2d 80, 127 N.E.2d 820, 137 N.Y.S.2d 35 (1955) (upholding parental refusal to allow operation to correct cleft palate); *In re Hudson,* 13 Wash. 2d 673, 126 P.2d 765 (1942) (upholding parent's refusal to permit removal of daughter's grossly deformed arm, although condition would result in permanent psychological and circulatory damage).

Similarly, in *Planned Parenthood* v. *Danforth,* 44 U.S.L.W. 5197 (U.S., July 1, 1976), the Court determined that a minor female's privacy right to determine whether or not to terminate her pregnancy outweighs the parents' right to control the child's actions by refusing to consent to an abortion. *Id.* at 5204. It is important to emphasize, however, that the Court reached that decision only *after* reviewing cases such as *Meyer, Pierce,* and *Yoder,* and concluding that the constitutional right of parental discretion and family integrity established by those cases was outweighed by the child's interest in this particular situation. *Id.* at 5203-04.

With the rare exceptions reviewed above, governmental respect for parental decision-making is essential to preserving the integrity of family life. Under

our social and legal system it is the parents who necessarily must assume responsibility for the myriad of difficult decisions concerning the health and welfare of their children. Indeed, parents who fail to do so may be guilty of neglect. A basic corollary of that responsibility or duty is the right to make those decisions free from unreasonable outside interference. *See* Kleinfeld, *Balance of Power Among Infants, Their Parents and the State,* 4 FAM. L.Q. 409, 413 (1970). *See also* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 CAL. L. REV. 840, 852 (1974) (juvenile commitment laws "have as their paramount objective the maintenance of family autonomy in dealing with aberrational behavior within the family"). Indeed, day in and day out, parents are called upon to make decisions of vital significance to the child's "liberty" or "property" interests—should the child be sent to a boarding school, have a tonsillectomy, study Latin, get braces? Even when the state is involved in such decisions,[4] however, it is seldom suggested that the child should have a right to receive a lawyer and a hearing to review each such parental determination. The reason is clear: parents' interest in preserving their authority and exercising their independent responsibility normally outweighs the child's interest in a legal procedure to question each such decision.

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[4] Frequently, some state action will be involved in such decisions—for example, through state educational or medical institutions. However, it should be noted that many parental decisions affecting the "liberty" of their children do not involve any state action. Indeed, parents frequently seek psychiatric care (as well as other forms of medical treatment) for their children from *private* physicians or residential facilities. A judicial ruling requiring due process hearings in all such situations, absent any state regulation or participation, would be inappropriate. *See generally Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

In determining what procedures should be required by the due process clause when parents seek to admit their child to residential psychiatric care, the court below erred by failing to give any consideration at all to the parents' independent constitutional right and responsibility to control the care and upbringing of their children.

B. A Blanket Rule Requiring Immediate Due Process Hearings in All Cases Would Result Frequently in Psychological Harm to the Children.

Another factor which the lower court unfortunately failed to take into account in determining what process is due before parents can admit their child for residential psychiatric care is the very real danger that because of the unique, emotion-laden situation created by these parent-child conflicts, a traditional due process hearing procedure poses severe risks, in certain cases, of psychological harm to the children whom the court was seeking to protect.

It is dangerously easy for courts to assume that the procedural model mandated for juvenile delinquency hearings, *see In re Gault,* 387 U.S. 1 (1967), can be adapted with little modification to psychiatric admission cases. From a clinical standpoint, however, this is highly improper. Indeed, if the procedural rights granted to children in order to oppose the state in a juvenile delinquency proceeding were applied without exception to cases where children oppose their parents' decision to obtain psychiatric help for the children, the result might be to strain, if not irrevocably rupture, the essential emotional relationship between parent and child. *See generally Wolff* v. *McDonnell,* 418 U.S. 539, 563, 567 (1974) ("there would be great unwisdom in encasing the . . . procedures in an inflexible constitu-

tional straitjacket that would necessarily call for adversary proceedings [that would] very likely raise the level of confrontation"; rules of procedure must be "shaped by the consequences which will follow their adoption"); *Frost* v. *Weinberger,* 515 F.2d 57, 66 (2d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3501 (U.S., Mar. 8, 1976) (extent of procedural safeguards must vary "inversely with the burden and any other adverse consequences of affording it").

Amici must emphasize to the Court that judicial procedures that are commonplace and comfortable for lawyers and judges—presenting testimony in open court, being cross-examined by counsel for an adversary party, etc.—are extremely unpleasant, if not traumatic, for children and parents caught up in what is at best a very difficult emotional process. The most conscientious parents frequently struggle for some time to accept the judgment of a psychiatrist that it is in the best interest of their child to send him or her to a residential institution. "For most parents hospitalization [of their child is] a traumatic experience. . . ." E. HARTMANN, ET AL., ADOLESCENTS IN A MENTAL HOSPITAL 84 (1968).[5] To subject those parents to the additional unpleasant stage of a hearing at which ad-

[5] "For most parents, the placement of a child in a psychiatric treatment facility entails considerable expense and some humiliation." Lessem, *On the Voluntary Admission of Minors,* 8 U. MICH. J. LAW REFORM 189, 203 (1974); *see* Mandelbaum, *Parent-Child Separation: Its Significance to Parents,* in G. WEBER & B. HABERLEIN, RESIDENTIAL TREATMENT OF EMOTIONALLY DISTURBED CHILDREN 68, 74 (1972):

> What are the feelings of parents who face the prospect of residential treatment for their child? . . . [D]uring the admission procedure a universal reaction is that the child's need of residential treatment reveals their inadequacy as parents. They have been found deficient in qualities of goodness.

versary counsel would cross-examine the parents concerning their motivations, good faith, and possibly their own emotional problems,[6] could have significant negative consequences.

First, it might have the effect of deterring some parents from proceeding with needed residential treatment for their children.[7] This is a serious problem because, in spite of the common and frequently justified criti-

[6] *See* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 CAL. L. REV. 840, 889-90 (1974):

> In the hearing, the lawyer will in most cases want to examine the parents as witnesses in order to explore their reasons for seeking the child's commitment, their perceptions of the child's problems, their relationship to the family's problems.

[7] The court below recognized that a parent's decision to institutionalize a child is a difficult one to make and that too many procedural obstacles may deter parents from initiating needed hospitalization (App. 800a):

> A decision to institutionalize a child is often a difficult yet necessary decision for a child's parent to make. It is generally pursued only after all other alternatives have proven futile. The state has an interest in seeing that a procedural system will not deter parents, already faced with this difficult decision, from attempting to institutionalize children who are in need of treatment only mental institutions can provide.

Parents, as a "normal" reaction to their child's emotional illness, look for reasons why they need not or cannot hospitalize their child. *See, e.g.,* Philips, *et al., Intake for Inpatient Care,* in S. SZUREK, I. BERLIN & M. BOATMAN, INPATIENT CARE FOR THE PSYCHOTIC CHILD 66, 68 (1971):

> In our experience . . . many parents of severely disturbed children ask for help in such negative and distorted ways as to half-invite rejection. Requests may be phrased: 'I am calling just to find out how long the waiting list is.'

The additional hurdle of a court hearing, mandated to occur soon after admission, would similarly discourage, or be used as an excuse by, confused, dejected parents who know they ought, yet fear to hospitalize their child.

cisms of our nation's mental health institutions for children,[8] the appropriate form of care and treatment for many [9] retarded or disturbed children still includes residential care for some period.[10] Indeed, studies continue to suggest that one of the fundamental problems

[8] See p. 24 and n. 21, *infra*.

[9] For most disturbed youth, of course, community care is preferable to placement in a large residential institution. *See* JOINT COMM. ON MENTAL HEALTH OF CHILDREN, CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970's, at 39, 269 (1969):

> Children are best cared for and treated in atmospheres more related to health and normal living than to illness. Every effort should be made to keep the child as closely as possible within his normal setting. This means that we must expand non-hospital treatment arrangements, particularly those that could be operated under the auspices of community-based facilities, such as community mental health centers, educational settings, and social service agencies.
>
> *It is the conviction of this Commission that no child or young person should be placed in a mental hospital without a careful professional diagnosis and without preliminary attempts to help him through other forms of treatment on an out-patient basis in his own home or at least in his home community.* [Emphasis added].

A similar trend is occurring for the mentally retarded. As reported by the President's Committee on Mental Retardation, the total number of residents in public institutions for the mentally retarded decreased more than 10 percent between 1970 and 1975. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MENTAL RETARDATION: TRENDS IN STATE SERVICES 29 (1976).

[10] *See, e.g.*, Khan, *"Mama's Boy" Syndrome*, 128 AM. J. PSYCHIATRY 712 (1971). *See generally* Tizard, *et al., Environmental Effects on Language Development: A Study of Young Children in Long-Stay Residential Nurseries*, in S. CHESS & A. THOMAS, ANNUAL PROGRESS IN CHILD PSYCHIATRY AND DEVELOPMENT 705, 728 (1974):

> In conclusion, we would argue that in view of the wide variety of institutional settings, and the evidence from this and earlier studies . . . of their varying effects on development, it is perhaps time to abandon the concept of 'the institution' as a factor in development, and to replace it with a consideration of the effects of different institutional regimens on different aspects of development.

See also Rinsley & Inge, *Psychiatric Hospital Treatment of Adolescents*, 25 BULL. OF THE MENNINGER CLINIC 249 (1961); D. HOLMES, THE ADOLESCENT IN PSYCHOTHERAPY 132-41 (1964).

in mental health care today is not "over-institutionalization," but in fact the shortage, due to lack of resources, of high-quality residential institutions. *See* R. GLASSCOTE, M. FISHMAN & M. SONIS, CHILDREN AND MENTAL HEALTH CENTERS, PROGRAMS, PROBLEMS, PROSPECTS 24 (1972) (the number of young people requiring psychiatric treatment is "many times the number who at present are receiving any treatment"); JOINT COMM. ON MENTAL HEALTH OF CHILDREN, CRISIS IN CHILD MENTAL HEALTH, CHALLENGE FOR THE 1970's, at 6 (1969) ("for every child admitted to [a good private residential facility] ten or more are turned away because of lack of space"; "the fact is that only a fraction of our young people get the help they need at the time they need it"). Hospitalization must be considered as only one phase, but sometimes a necessary phase, of the total treatment of the patient. *See, e.g.*, Rabiner & Lurie, *The Case for Psychiatric Hospitalization*, 131 AM. J. PSYCHIATRY 761, 764 (1974). Amici firmly believe that hospitalization is helpful to many patients, both adults and children, and is the treatment of choice for many acute and severe psychiatric conditions.[11] Judicially imposed procedural requirements should not be so onerous that they deter parents from

[11] While reliable empirical data are lacking in this area, "[c]linical impressions do suggest, however, that good residential treatment programs lead to more satisfactory development and functioning in the child than might otherwise have occurred if the child had not been admitted." Lewis & Solnit, *Residential Treatment*, in A. FREEDMAN, ET AL., COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II, at 2249 (1975).

seeking residential psychiatric care for their children in appropriate cases.

Second, hearing procedures can severely strain the relationship between the parent and the child. The aspect of hearings which is most distressing to children relates to the "negative remarks made about them by the parents,"[12] thereby adding to the burden of the family attempting to deal constructively with its problems. In the possibly analogous area of "PINS" cases (dealing with "persons in need of supervision," or minors who traditionally have fallen under the jurisdiction of the juvenile court), studies show that judicial proceedings are "damaging to an already strained family situation":

> Whatever motivates parents to bring their children before the court, the courtroom experience does not generally ameliorate existing animosities, despite the supposedly "protective" nature of the proceeding. To the contrary, able defense attorneys become surrogate parents and necessarily proceed to "destroy" the natural parents verbally on cross-examination before the defendant-child.[13]

Because of these problems, formal adversary proceedings, especially for younger children, may create more family dissension and risk the further breakdown of family structure. *See* Note, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings,* 13 J. FAM. LAW 803, 813 (1974).[14]

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[12] Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 CRIME AND DELINQUENCY 180, 189 (1971).

[13] Stiller & Elder, *PINS—A Concept in Need of Supervision,* 12 AM. CRIM. L. REV. 33, 59 (1974).

[14] Indeed, due process hearings, rather than deterring parents from "dumping" their children, in some instances may enhance

Finally, studies have found that in certain instances court hearings create in the child a considerable feeling of uneasiness, if not anger.[15] Based upon clinical experience, Amici have found that younger children, especially, are likely to be intimidated and confused by formal hearing procedures. The course of the child's therapy may be harmed by what the child might perceive as a legal attack during the hearing on the competence and judgment of the child's therapist who is recommending residential treatment.[16]

Not only do hearings create substantial risks of harm in some cases, but their supposed benefits in these situations are often overstated. Unfortunately, the promise of procedural due process as an effective check on

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the likelihood of just such an unwanted and negative outcome. The traditional court sanction directed towards parents who mistreat their children (child abuse, child neglect) is to remove the child from the home. In the situations of concern to the court below ("unneeded" child hospitalization) such a sanction for parental behavior would be meaningless. Confronted by a "victorious" child—one not permitted by a court to be hospitalized—parents may feel they have no other alternative but to turn the care of the child over to the state. Thus, a child who might have been hospitalized, visited by his or her parents, and eventually returned home, instead would be confronted with the complete rupture of the parent-child bond.

[15] Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 CRIME AND DELINQUENCY 180, 181 (1971).

[16] *See* Miller, *Children's Rights and the Juvenile Court,* in AMERICAN PSYCHIATRIC ASS'N, SCIENTIFIC PROCEEDINGS IN SUMMARY FORM, 129th ANNUAL MEETING 35, 36 (1976):

> The adversary role of lawyers is antithetical to good child care for a variety of reasons. The disturbed child who goes to court abandons the right to confidentiality and a perceived attack on a therapist may negate the value of therapy. A child may perceive a therapist as being devalued. Repeated legal recheck as to the necessity for treatment can create doubt in the child as to whether the designated helpful person can be trusted.

improper institutionalization frequently proves illusory. Most judicial commitment proceedings are "perfunctory, ritualistic, impersonal, superficial, and presumptive of mental illness." Beran & Dinitz, *An Empirical Study of the Psychiatric Probation-Commitment Procedure,* 43 AM. J. ORTHOPSYCHIATRY 660 (1973). One study of 64 such hearings found that the average hearing lasted only 4.45 minutes, with the court most often accepting uncritically the psychiatric recommendation. *Id.* at 664, 667. Other studies have reached similar conclusions. *See, e.g.,* T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 135 (1971). Thus, simply providing hearing procedures, especially so soon after admission that there is little opportunity for the institutional psychiatrists to present a full report and meaningful evaluation to the tribunal, may not provide the significant protection plaintiffs seek. Nor will it contribute at all to dealing with the larger problem of improving the care and treatment available for mentally ill and retarded children.[17]

Moreover, while advocates of hearing procedures point out that psychiatric commitment in our society unfortunately continues to carry with it an element of

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[17] *See* Tamilia, *Neglect Proceedings and the Conflict Between Law and Social Work,* 9 DUQUESNE L. REV. 579, 589 (1971) ("Equal justice through procedural safeguards that does not require substantive justice for each individual is not enough"); J. POLIER, THE RULE OF LAW AND THE ROLE OF PSYCHIATRY 100 (1968):

> While the progress made in protecting the constitutional rights of the child in the adjudicatory process is to be welcomed, it will in no way compensate for the lack of dispositional remedies. *Gault* may protect some children from unfair hearings and wrongful findings, but it will not provide one dollar's worth of professional mental health services or one hour of care for any troubled child.

stigma, *see* App. 795a,[18] what they overlook is that such stigma is far more likely once a court has heard evidence and made a judicial commitment determination than it would be if a child is admitted voluntarily to a hospital by his or her parents, without court intervention.[19]

It should also be noted that the procedural system mandated by the court below would be extremely time-consuming and expensive. After performing other medical and administrative duties, the average hospital staff psychiatrist is able to devote only 47 percent of his or her time to direct patient care. JOINT INFORMATION SERVICE, ELEVEN INDICES 14 (1971). Any significant increase in the number of hearings required not only would encroach still further into the psychiatrists' limited time for patient care, but also would require the expenditure of substantial amounts of money for legal fees, court personnel, etc.—costs which most likely would be drawn from the already too limited state mental health budgets.[20]

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[18] *See generally* MacMillan, *et al., The Mentally Retarded Label: A Theoretical Analysis and Review of Research,* 79 AM. J. MENTAL DEFICIENCY 241 (1974); Roth, *Some Comments on Labeling,* 3 BULL. AM. ACAD. PSYCHIATRY & LAW 123 (1975).

[19] Indeed, voluntary commitment procedures were designed originally for the very purpose of reducing such stigma.

[20] *See* Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1276 (1975):

> It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.

Amici recognize that abuses do occur under the present system. Unfortunately, all too many of the nation's psychiatric institutions are unaccredited and lack the resources necessary to provide high-quality care and treatment for the many children requiring that assistance.[21] Moreover, there can be no doubt that in some cases unfit parents may seek to abandon their responsibilities by "dumping" their children into an inappropriate residential institution. However, the remedy for these problems must be fashioned carefully by the courts so as not to deter or make unduly difficult the appropriate use of high-quality institutions by the vast majority of conscientious parents who are seeking help for their disturbed or retarded children. In the section that follows Amici will suggest how we believe the Court should balance these factors in order to provide for due process hearing procedures in the situations where they can be most effective, while avoiding the adverse consequences that inevitably would follow from the blunderbuss approach of the lower court.

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[21] *See* JOINT COMM. ON MENTAL HEALTH OF CHILDREN, CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970's, at 42 (1969) ("most [residential care facilities for mentally ill children] are disgraceful and intolerable"); NATIONAL ASS'N FOR RETARDED CITIZENS, POLICY STATEMENTS ON RESIDENTIAL SERVICES 6 (1968) ("[m]ost residential facilities are still custodial-oriented and lack programs based on individual needs"); *id.* at 6, 9:

> Most residential facilities for the retarded throughout the country are large, overcrowded, and impersonal . . . oftentimes basic health and safety standards are not met . . . many residents . . . are rarely seen by a physician. . . . Abuse, neglect, accidents and questionable deaths are not adequately investigated or reported.

III. BALANCING THE CHILDREN'S RIGHTS AND THE OTHER CONSIDERATIONS REFERRED TO ABOVE, THIS COURT SHOULD EXCEPT FROM DUE PROCESS HEARING REQUIREMENTS THOSE CASES IN WHICH (1) A PARENT IN AN INTACT FAMILY WISHES TO ADMIT A (2) PRE-ADOLESCENT CHILD TO (3) AN ACCREDITED INSTITUTION (4) FOR A SHORT-TERM PERIOD.

Amici have demonstrated in Section II above that due process hearing procedures have a very real potential for harm to the interests of both parent and child in certain circumstances. The most serious deficiency of the decision below is that it ignored these potential harms and greatly oversimplified the complex clinical realities in order to fit this case into a traditional, unbending due process mold. The class of plaintiffs before this Court is far from uniform, however, and the procedural requirements best suited to their differing interests must also vary, depending on several key factors totally ignored by the district court.

The interests of the child and the parent, as well as the potential of hearing procedures for either good or harm, will differ radically depending on such factors as (1) the identity of the party seeking the child's psychiatric admission—whether it is a parent, or a state institution such as the welfare department; (2) the age of the child; (3) the quality of the proposed institution; and (4) the duration of the proposed commitment—whether, for example, it is a weekend of "respite care" designed to assist parents of a retarded child, or whether instead it is an indefinite institutionalization of a family's profoundly retarded or disturbed child who may be expected to remain in the institution for many years. Such factors as these were not considered in the district court's undifferentiated ruling requiring the same hearing procedures for all cases. Amici respectfully urge this Court to recognize these very real differences as they relate to the propriety of a traditional due process model, and to bal-

ance these factors so as to except from adversary hearing requirements any instance in which *all* of the following four factors are met: (1) a parent in an intact family wishes to admit a (2) pre-adolescent child to (3) an accredited institution (4) for a short-term period (*e.g.*, less than 45 days). Amici will set out below the considerations that we believe should lead the Court to this resolution.

First, the clearest line that should be drawn is between parent-initiated admissions and those instances in which an institutional guardian, such as a state welfare department, seeks to transfer the child from one institution into another. The dangers of adversary hearing procedures referred to in Section IIB above—such as the risk to the parent-child emotional relationship inherent in such hearings—are not so compelling when it is a state agency, rather than a parent, seeking the admission. Moreover, the interest in parental integrity and the assurance of parental responsibility to minimize risks of abuse are not present in such cases. Accordingly, where a psychiatric admission is sought by a state institution, rather than a parent in an intact family, Amici believe that hearing procedures may be appropriate.

A second factor ignored by the court below is the age of the child. All of the named plaintiffs were fourteen years of age or older at the time of their initial hospitalization. *See* p. 3, *supra*. Nevertheless, the remedy ordered by the district court extends to all children of any age, even those too young to understand or participate meaningfully in the hearing procedures. It is significant to note that the Pennsylvania statute at issue here includes procedures for adolescents sep-

arate from those for pre-adolescents.[22] Amici believe that such an age distinction has a highly significant effect on the impact of hearing procedures on children, and it should be legally recognized. The professional literature establishes that when children reach a *developmental age*[23] of approximately 13 they begin to be significantly more capable of rational and analytical evaluation of their own best interests, as well as articulate expression of their views.[24] Amici believe that Pennsylvania has appropriately determined that adolescent children should be entitled to an opportunity to present their views whenever they disagree with their parents' decision to seek residential care for them. Adolescents will be far less threatened by the hearing

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[22] *See* p. 3, *supra*. Indeed, under the newly enacted state Act, adolescents 14 years of age and older are now treated the same as adults. *See* Section I, *supra*.

[23] The concept of developmental age is quite different from that of chronological age and, in instances where the two differ significantly, developmental age should control. *See generally* T. ACHENBACH, DEVELOPMENTAL PSYCHOPATHOLOGY (1974). For example, severely retarded children by definition will rarely, if ever, have a developmental age placing them in the adolescent range. Mentally ill children, also, will frequently exhibit signs of developmental regression as a symptom of their illness.

[24] The authorities vary somewhat concerning the precise developmental age at which these skills are present. The consensus is that the age range is from 12-14. *See, e.g.*, Schwartz, *Children's Concepts of Research Hospitalization*, 287 NEW ENG. J. MED. 589 (1972); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1395 (1974). *See generally* J. PIAGET, MORAL JUDGMENT OF THE CHILD 17, 40 (1932); A. GESELL, F. ILG, & L. AMES, YOUTH: THE YEARS FROM TEN TO SIXTEEN 175-182 (1956); Neubauer, *Normal Development in Childhood* in B. WOLMAN, MANUAL OF CHILD PSYCHOPATHOLOGY 11 (1972). Amici believe that states should have latitude to select an appropriate age distinction within this general range, as Pennsylvania has done.

procedures and will be much more capable than pre-adolescents of using these procedures effectively.

A third factor which was ignored by the lower court is the quality of the institution being proposed for the child. Amici believe that this factor not only has profound significance from the standpoint of the child and the mental health professional, but also should be relevant to the legal determination of what procedural rules are appropriate in these instances. In balancing the interests of the child in a due process hearing against the other factors referred to in Section II, above, the nature and extent of the possible injury to the child's constitutionally protected interests hardly should be deemed irrelevant. The sad truth is that the quality of mental health institutions today for children throughout the nation varies dramatically. There are many excellent institutions that are fully staffed and possess the resources necessary to provide the child promptly with the treatment best suited to his or her needs. Many other institutions, however, are woefully lacking in trained staff and resources and in some cases may do little more than "warehouse" the children. *See* p. 24 & n. 21, *supra*. The Joint Commission on Accreditation of Hospitals, a recognized professional body which certifies institutions as meeting the minimum standards necessary for appropriate care, has denied accreditation status to numerous institutions throughout the country which are failing to provide adequate mental health care for children and adolescents. Amici believe that the risk of psychological injury to children who are placed in such unaccredited institutions is sufficiently high that it outweighs the possible harm of hearings. Amici recommend that no admission to an unaccredited institution should be

sanctioned by the state absent a due process hearing at which the alternatives to such a placement would be fully evaluated.

Finally, the lower court lumped together in its ruling virtually all admissions, regardless of duration. It required an initial "probable cause" hearing within 72 hours of the child's admission, and it required notice of such hearing to the child and the child's attorney at least 48 hours prior to the hearing. Thus, the appointment of an attorney for the child and the initiation of adversary hearing procedures under the court's order must begin within the first 24 hour Amici believe that in view of the potentially harmful aspects of admission hearings discussed above, a constitutionally imposed procedural rule should not forbid states from taking into account the very significant differences between short-term and long-term institutionalizations. For example, in caring for the retarded it is a generally accepted principle that parents whenever possible should try to keep the child in the home.[25] This can place great strains, both physical and psychological, on the family. Therefore, it is quite common for institutions for the mentally retarded to assist families by making a certain number of beds available for temporary "respite care," helping families to avoid long-term institutionalization of their retarded child by giving them an opportunity for a weekend or short vacation[26] in which they can be relieved of the difficult

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[25] *See generally* W. WOLFENSBERGER, NORMALIZATION: THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES (1972).

[26] In Pennsylvania such relief care is available for periods ranging from one day to four weeks. PA. DEPT. OF PUB. WELFARE, OFFICE OF MENTAL RETARDATION, GUIDELINES FOR THE OPERATION OF THE FAMILY RESOURCE SERVICES PROGRAM 9 (1975).

burden of caring for their retarded child 24 hours a day, seven days a week.[27] Under the decision of the court below, any such respite care that lasted more than 72 hours could not be obtained by the parents without incurring the time-consuming, expensive, and emotionally difficult process of a "probable cause" hearing, in which the tribunal presumably would assess whether the parents were being selfish or otherwise acting unreasonably in seeking such assistance. Such a procedure would impose a cruel price on the very people who are trying the hardest to care for their children and to avoid placing that responsibility on the state. To force states to impose such procedures as a constitutional requirement simply makes no sense. Moreover, there are other types of short-term institutional programs (for example, treatment for enuresis, or bed-wetting) which require only a few days' or weeks' residential care and which might properly be treated very differently from cases in which parents are seeking long-term institutionalization for their children.

This Court has already recognized and affirmed the appropriateness of a state's allowing *short-term* psychiatric institutionalization prior to commencement of due process hearing procedures. *Briggs* v. *Arafeh*, 411 U.S. 911 (1973), *aff'g summarily Logan* v. *Arafeh*, 346 F. Supp. 1265 (D. Conn. 1972). In *Arafeh*, this Court affirmed the decision of a three-judge United States District Court rejecting a constitutional challenge to a state statute that authorized involuntary mental hospital commitment of adults who are certified by physi-

[27] The latest data available to Amici indicate that in 1974-75, 525 retarded children in Pennsylvania received such respite care.

cians to be suffering from mental illness and to be dangerous to themselves or others. The statute in question authorized confinement without any prior notice or hearing and provided that if the patient objected to the hospitalization, and the state nevertheless wished to continue the commitment, the patient would receive the right to counsel and an adversary hearing "not more than 45 days" after the initiation of commitment proceedings. *Logan* v. *Arafeh, supra,* 346 F. Supp. at 1267 n. 3. In language that is directly applicable to the instant case, the district court held that the 45-day period before hearing procedures would be required is not only constitutional, but entirely reasonable in light of the expert testimony from professionals in this field (*id.* at 1268-69):

> Testimony received from expert witnesses established that the fifteen day leeway after initial commitment before judicial proceedings must be begun is not simply for the purpose of delay. It has a positive aspect as well. There is a compensating advantage to the committed person because in many cases during this period the medical staff at the hospital can adequately alleviate his mental illness or by use of non-emergency diagnostic procedures determine that he is not a 'danger to himself or others.' In such cases, the stigma of court record is avoided and the length of confinement is shortened. It must be remembered that commitment has not been undertaken for the sake of penal detention. The patient is committed for treatment and care, and some knowledge of his mental condition can be gained by visual observation and diagnostic tests. This takes time. On the other hand, where a full blown court trial must be had pursuant to § 17-178, additional time to undertake more elaborate testing of the patient's mental condition, and a more detailed probe into his relevant his-

tory, by both the hospital authorities and the expert witnesses who will testify in behalf of the patient is needed.

While it is possible that all of this could be concentrated into a shorter period of time, we are satisfied that the time which is allowed by the statute is not so unreasonably long as to amount to a denial of due process. The time provisions set by the legislature are fully supported by the opinions of competent physicians specializing in the treatment and care of persons suffering from mental illness. We hold that there is a rational basis for the time allowed by the statute.

The *Briggs* v. *Arafeh* precedent was followed recently in *Coll* v. *Hyland,* 411 F. Supp. 905, 910 (D.N.J. 1976) (three-judge court) (20-day delay between commitment and hearing constitutional). *See also Saville* v. *Treadway,* 404 F. Supp. 430, 437-38 (M.D. Tenn. 1974) (upholding 45-day "respite care" and six-month "Short-Term Training Admissions" for mentally retarded children, absent hearing procedures); *Fhagen* v. *Miller,* 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied,* 409 U.S. 845 (1972) (upholding procedure allowing confinement for 15-25 days prior to hearing). The court below in the instant case erred in ignoring that precedent, which is directly applicable here.[28]

The four factors discussed above suggest the type of balancing approach that Amici believe the lower court should have utilized. In cases where the state rather than a parent has initiated the commitment proceeding, there are insufficient countervailing factors to out-

[28] Lower courts are required to give no less precedential weight to this Court's summary affirmances than to its other holdings. *See Hicks* v. *Miranda,* 422 U.S. 332, 344-45 (1975).

weigh the child's right to a due process hearing. Similarly, if the proposed admission is to an unaccredited institution, Amici believe that the risk of harm to the child is high enough to outweigh the potential dangers inherent in hearing procedures—damage to family autonomy, psychological harm of parent-child conflict at hearing, or the possibility that procedures will deter parents from initiating the admission. Also, as discussed above, the age distinction drawn by Pennsylvania in granting to adolescent children the right to be heard in all cases before admission is constitutionally appropriate, in our view, because of the older children's increased ability and interest in expressing their opinions. The final distinction Amici are urging —between short-term and long-term admissions—also flows logically from a consideration of the shifting interests and risks in these cases. A basic premise of admissions for a short period, such as 45 days, is that the parents intend to maintain or strengthen the family unit and will resume care of the child at the end of the 45-day period. Such a period allows for emergency psychiatric intervention, evaluation of the child's psychiatric needs, or short-term intensive treatment. In cases where continued institutionalization appears necessary, the short delay prior to a hearing would assist the mental health professionals in developing the most appropriate information to present to a tribunal concerning the child's condition and their recommended treatment plan. Because the basic premise of a rule allowing short-term institutionalization without prior hearing procedures is that the child will return home shortly, the danger of parental abuse, or "dumping," is lessened significantly. The deprivation to the child in terms of lost liberty is also reduced. Indeed, it is not substantially greater than the loss sustained by a

child hospitalized for a serious but necessary surgical procedure. Given the desirability of minimizing parent-child conflict when it is expected that the child will be returning soon to the family, formal adversary proceedings in these cases should be avoided.

The situation is quite different, of course, when parents seek a long-term institutionalization of their child. Whether such a parental judgment is based on a genuine feeling that it is in the child's best interest, or on a bad faith effort to "dump" the child, it opens the prospect that the parents may terminate the primary intra-family relationship they have had with the child. Even if the parents will be frequent visitors or active participants in the course of institutional treatment, the child's primary frame of developmental reference most likely will shift to some degree from the family to the institution. Thus, the intact family unit is being replaced, through parental choice, by the mental hospital as the primary agent of child rearing during a significant period of child development. Because the parents have chosen to relinquish control of the child to the institution, the possibility of an adversarial conflict between parents and child would not pose as serious a threat to ongoing intra-family relationships in such instances as would be the case when only short-term institutionalization is sought.

Thus, Amici believe that a proper resolution of these factors would require that any due process hearing procedures mandated by the Court should *not* extend to those instances in which *all* of the following four factors are present: (1) a parent in an intact family wishes to admit a (2) pre-adolescent child to (3) an accredited institution (4) for a short-term period (*e.g.*, less than 45 days).

Once it is determined in what instances due process hearings should be required, Amici urge the Court not to limit the states' flexibility in seeking to establish the most appropriate types of forums and procedures to implement that decision. In most instances, the judgment to be made concerning possible institutionalization of a child requires consideration of many factors in addition to the child's mental condition—for example, what is the situation in the home, and how can the most appropriate treatment and counseling for other members of the family be provided? Amici believe that courts may not be the ideal forum for such determinations. Rather, an administrative model for the tribunal that reviews such matters may be the most effective way to include in the decision-making process all of the relevant input, psychiatric as well as legal. *See* Hoffman & Dunn, *Beyond* Rouse *and* Wyatt, *An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment,* 61 VA. L. REV. 297 (1975). Such an administrative tribunal might include, for example, a psychiatrist, a lawyer, and another mental health professional.[29] States should be free to experiment with a variety of mechanisms for implementing due process hearing requirements.

Finally, Amici urge this Court, in reviewing the decision below, to insure that whatever rules of procedure are finally mandated will be implemented in a manner

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[29] *See also* Task Force on Mental Health of Children and Youth, *The Rights of a Child To Refuse Treatment,* 1 MANDATE, PENNSYLVANIA'S MENTAL HEALTH NEWSLETTER, Oct. 1973, at 2; Mahan, *et al., A Mechanism for Enforcing the Right to Treatment: The Human Rights Committee,* LAW AND PSYCHOLOGY REV., Spring 1975, at 131, 147-48 (relating to human rights committees).

designed to protect the best interests of each child affected by such rules. The order of the court below requires that all children already admitted to mental hospitals must be "either discharged or released or recommitted according to the procedures required by our opinion and order" within 120 days of the effective date of the order. App. 851a. Amici agree that any new procedural requirements appropriately should be applied retroactively to children already residing in institutions. Indeed, apart from constitutional principles, Amici believe that periodic review of the treatment and condition of mental patients—such as that provided for in Section 108 of the new Act referred to at page 7, above—is desirable from a clinical standpoint. Amici strongly oppose, however, any arbitrary deadline that would require a large number[30] of formal hearing procedures to be initiated at once in order to implement new procedural requirements.[31] Such a deadline would reduce the opportunity of the hearing officials and the mental health professionals to examine each individual case carefully in order to determine the most appropriate future course for each individual patient. Any court order that resulted simply in either *pro forma* hearings or mass de-institutionalization,[32] without regard to the best interests of

[30] The Chief Justice of the Pennsylvania Supreme Court estimates that the decision below would require judicial intervention in 6000-8000 cases within five months. App. 864a.

[31] *See* Reich & Siegel, *Psychiatry Under Siege: The Chronically Mentally Ill Shuffle to Oblivion*, 3 PSYCH. ANNALS 35, 55 (1973) ("[d]ischarges and admissions at the hospitals should be based on individual circumstances rather than follow broad general policy shifts").

[32] *A caution on deinstitutionalization.* The bandwagon for community-based programs is gathering momentum, and it is entirely possible that the precipitous closing of large institutions without sufficient preparation in the community to receive and care for the children released may defeat a fundamentally sensible reform and produce a new crisis in caring. We actually know less about the effects of placing individuals in community settings than we do about the effects of consigning them to large institutions. Thus, progress in a community direction must be accompanied by the development of guidelines that will prevent a movement of children from bad large institutions to bad small ones.
N. HOBBS, THE FUTURES OF CHILDREN, CATEGORIES, LABELS AND THEIR CONSEQUENCES 220 (1975).

the individual patients, would be a cruel deprivation of the rights of the plaintiffs[33] whom the court below and Amici are seeking to protect.

[33] *See* Slovenko & Luby *On the Emancipation of Mental Patients*, 3 J. PSYCHIATRY AND LAW 191, 205-06 (1975):
Mental patients are going from the frying pan into the fire. Under the guise of civil liberties the state mental hospital has been transported to the inner city. It is true that many persons in institutions have been dehumanized through neglect and the failure of society to meet their needs, but turning them back into a so-called community will simply change the geography of neglect, and apparently exacerbate it. In today's world, neglect in the community dwarfs neglect in hospitals. Fundamentally the need that must be faced is the establishment of programs to meet the needs of people whether they are in institutions or in the community.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to vacate and remand this case in order to allow entry of a new order that will strike an appropriate balance, as outlined in this Brief, between the procedural rights of the plaintiffs and the competing interests that make adversary hearing requirements counter-productive in certain well-defined circumstances.

Respectfully submitted,

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